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Staking a Claim: Hans Island and Canada's Arctic Sovereignty

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Introduction

Canada's claim to the Arctic Archipelago is tenuous at best. As a matter of practical control, international legal status and the recognition of sovereignty by other states, it has always been thus. But the dispute over the ownership of tiny Hans Island, which recently pitted Canada against its Danish ally, represents perhaps the first line of defence in maintaining Canada's claim to the Arctic. Denmark has at stake the island and associated territorial sea, whereas Canada has at stake the principle of sovereignty over its Arctic territory, a large part of which is water.

There are three broad options with

which Canada could pursue its claim to Hans Island: 1) assert a claim unilaterally; 2) bring the case before the International Court of Justice (ICJ), or; 3) pursue direct negotiations with the Danes and/or multilateral negotiations to establish a favourable outcome.

A unilateral claim would be risky, as it would arouse the ire of the major shipping and Arctic states (especially the United States, thus handing the Danes an important ally) and would be very difficult to enforce. The second option has greater appeal because it would settle the issue once and for all, and because Canada's case for historic exclusive use does have merit. This despite the fact that Inuit people's habitation patterns only tangentially relate to a large segment of the Arctic Archipelago, including Hans Island. But the Northwest Passage, which is the key 'resource' threatened by a Danish claim to Hans Island, meets several criteria as an International Strait. Therefore the ICJ is as likely to rule against Canada as it is to rule in its favour.

The third, preferable, option is to secure through negotiations an international (bi-lateral or multilateral) management regime that is favourable to Canadian interests. It has the double advantage of utilizing the highly successful functional principle, which allows Ottawa to set the tone and pace of talks, and avoids discussion of specific disputes by subsuming them into a larger framework.

The 'Sector Theory'

Before one can adequately consider the question of Arctic sovereignty, an important quasi-legal (and politically-charged) concept must be explored. The Sector Theory,¹ put forth by Canadian explorer Capt. Joseph Bernier at the turn of the 20th century, holds that the Arctic should be divided between the six nations (the US, Canada, Denmark, Norway, Iceland, Russia) that have territorial claims there by extending the land, or territorial sea borders, in straight lines to the North Pole. As early as 1909 this means of establishing claims appeared on Government of Canada maps, apparently by bureaucratic initiative alone. Legally, the theory is spurious. However, it continues to appear on occasion, especially during bilateral or multilateral negotiations. Canada's and Denmark's land claims occupy most of their 'sectors', while the other four nations have sectors covered by pack ice and the ice sheet. This approach would render the Canada's Arctic a closed zone, creating an ideal situation for Canadian negotiators. It would be an accepted convention and would affirm Canada's sovereignty and represent the largest possible territorial aggrandizement.

It is important to note that if Canada were to establish either functional or legal jurisdiction over the archipelago waters, it would in effect recognize its own sector claim. This would give Canada a distinctly advantageous position

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in the Arctic, with no change in status for the other states in the region. However it would add to other nations' sensitivity and suspicion about Canada's claim. Hans Island lies on the border of the Danish and Canadian sectors and even slight changes in the boundary would affect several thousand square kilometres of ocean territory – including ownership of all the resources in it, or under it.

Options for dispute resolution: Shipping issues

Canada could resolve the dispute by lowering the value of the waters around Hans Island. This could be accomplished by developing alternatives to sea travel as a means of transporting natural resources from the High Arctic. The value of owning the sea would be dramatically reduced if commercial shipping were uneconomical. The 1969 voyages of the US tanker *Manhattan* demonstrated how oil could attract Arctic shipping. But pipelines represent a credible alternative to tanker-delivered oil to the North American market. Canada should vigorously support the use of pipelines to convey hydrocarbons from the far north. The negotiation of Article 234 in the third UN Convention on Law of the Sea (UNCLOS III) supports this policy,² as surely would political pressure from northern communities worried about a repeat of the 1989 Alaskan oil spill from the tanker *Exxon-Valdez*.

Shipping is one of the most contentious issues because it goes to the heart of the jurisdictional question. Canada can expect support for a restricted shipping regime from the home-rule government in Greenland, which is fiercely protective of the environment. This would effectively divide the Danish position. The Greenlandic government has historically been prone to jealously guard its water resources, as they are among the few resources that it has. The transit of foreign tankers is likely to provoke its ire, although, admittedly, opportunities for serious economic development may cause it to feel otherwise.³ Regardless, the negotiation of a multilateral regime governing shipping in the Arctic environment could be desirable – at

least more so than an arrangement based on the wishes of individual states, which are worth little in the eyes of the ICJ.

'Courting' a settlement

Of course, legal confrontation may be unavoidable. Another nation may simply challenge Canada's claim and its actions to support it, such as setting vessel-construction/maintenance standards, which can be argued to be prohibitively expensive. The most likely parties to bring a legal case against the entire management regime in the Arctic are Norway (which has successful experience using the ICJ) and Japan. Both of these countries have little at stake because they are not using the Northwest Passage, but they have expressed interest in it and would like to keep their options open. They are interested in Arctic whaling, the Passage as a convenient shipping lane, and access to petroleum resources. A legal challenge is very unlikely from Denmark itself, which has a tenuous position in the High Arctic today.⁴ In public, the US and Russia are very much in favour of the *status quo*, despite private preferences for sectoral claims.

If a legal dispute is inevitable, it is reasonable to ask why Canada does not bring its case before the ICJ and fight it on its own terms. But a case is not inevitable and Canada's case is not ironclad. Fortunately, there is a positive precedent: The Anglo-Norwegian Fisheries Case (1951). This case allows for encapsulating coastal archipelagos with reasonable baselines (those that follow the general direction of the shoreline) so as to allow the coastal state to apply its entire jurisdiction over its territory. Canada has a clear advantage over Denmark on these grounds, as a simple look at a map will reveal.

However, this is where the key source of dispute manifests itself. The case of Hans Island is essentially about moving the baseline to one side of the island instead of having it pass through the middle. The waters so enclosed must be those that have historically (or by convention) been used only by the coastal state.⁵ Given that Canadian ships repre-

sent over 75 percent of the region's maritime traffic, Canada has a strong claim. When one adds the 4,000-year use of the archipelago waters by Canada's Inuit population, Canada's position of sole occupation and interest is even stronger.⁶ Patrols by the paramilitary Canadian Rangers provide further evidence of sovereignty.⁷

But however strong Canada's record of occupation is, the Anglo-Norwegian Fisheries case does not involve an international strait, of which Hans Island sits on the doorstep. Thus Canada would, in effect, be using this precedent surreptitiously to achieve its objectives relating to the Northwest Passage. The Court may reject the invocation of this precedent, citing the case of the Corfu Channel, where a straight was almost entirely encompassed by Greece's Territorial Sea, but where heavy use by other countries caused the Court to deem the straight 'international'.⁸

The legal dimension is further complicated by the Fisheries Jurisdiction Cases (1974). These cases concerned a unilateral Icelandic extension of its territorial jurisdiction, which was opposed by the Federal Republic of Germany and the United Kingdom. The Court ruled decisively against Iceland and decreed that it needed to negotiate in good faith with the other two parties if it wanted to enact alterations to their rights beyond the 12-mile territorial sea.⁹ It is plain to see how, even though the Court was loath to completely reject Iceland's position, this ruling severely debilitated the Icelandic negotiating position. Indeed, after this ruling had restored the *status quo*, there was no need for the UK or Germany to negotiate at all. These cases demonstrate the extreme risks of both unilateral action and appealing to the ICJ, no matter how meritorious the case.

The option of going to the International Court of Justice is based on a narrow reading of past cases. Again, one must consider the sector management approach. If Canada were to make a successful case before the ICJ, it would realize a claim to its sector, while the other Arctic states would not. The Court has been very hesitant to allow

this 'unbalancing' of the international system, where only single claims are resolved.

Sovereignty in steps

The principle that Canada has hitherto adopted, and is advocated in this paper, is that of increasing functional jurisdiction leading to a situation of recognized actual sovereignty (i.e. internal water status) over the archipelago waters, which by definition includes establishing more thorough control over all of the islands in the archipelago, including Hans. It is quite likely that the other nations - particularly the United States - would be willing to accept such an approach in order to make progress on other Arctic issues.¹⁰ (This is precisely the strategy employed in the negotiations stemming from the 1985 transit of the icebreaker *Polar Sea* through the Passage.) The result is a creeping claim to larger portions of the Arctic Ocean. If taken to its logical conclusion, the parties would be adopting the sector approach to Arctic management.

Fundamentally, the jurisdiction questions are irresolvable in direct negotiation because the vital interests of both Canada and the Denmark/Greenland are at stake.¹¹ This is not to say that Canada will eventually cede control of Hans Island. On the contrary, the gradual extension of functional responsibility has a greater probability of resulting in complete Canadian ownership because it establishes a pattern of historic exclusive use and actual occupation. There is a technical provision in the Arctic Cooperation Agreement of 1988 whereby one side ceremonially grants permission for use to the other. But the notion that this will not prejudice the legal position of the Canadian or American governments is nonsense. The more Canada uses Hans Island exclusive of others, the more it can be said to 'own' it.¹²

Similarly, the suggestion that Canada and the Denmark try to establish a bilateral regime to manage the Arctic, also setting aside the jurisdictional question, is prejudicial to the legal positions of the participants.¹³ It would establish a historical record of interna-

tional interest in the region, rather than exclusive jurisdiction. Such a record would reduce the Canadian position to claiming territorial status for the whole area.

The perils of unilateralism

If going the ICJ route is an undesirable option and negotiations are too slow, why should Canada simply not declare to the world its jurisdiction over the Arctic waters? Simply put, because such a declaration is unenforceable. The only country that has year-round access to its Arctic waters is Russia, due its fleet of massive icebreakers. In the 1980s Canada briefly considered acquiring a large icebreaker but abandoned the idea due to the prohibitive costs.¹⁴

Canada must therefore pursue a subtle foreign policy. This was made dramatically clear in an ugly incident following the *Manhattan* voyage. In a phone conversation on 7 April, 1970 the American Secretary of State William Rogers told Prime Minister Pierre Trudeau that the United States would defy any Canadian attempt to assert full sovereignty over the Northwest Passage - even to the extent of sending a nuclear submarine to the region.¹⁵ The precedent is pertinent in the case of Hans Island, as Denmark has a small fleet of frigates capable of navigating Arctic waters (one of which was used to briefly land troops on the island two years ago) while the Canadian Navy does not possess a similar capability.

It is important to note that while Canada has effectively asserted its claim to the international community, it has not done so brazenly. In the early 1970s Parliament passed an series of laws¹⁶ aimed at creating a jurisdictional regime for the Arctic for resource extraction, environmental protection, and vessel quality.¹⁷ These are of course all areas that would draw foreign interest in the Arctic and affect any operations that a foreign government or company would wish to undertake. Essentially they constructively exclude non-Canadians from the Arctic Archipelago. When Article 234 of UNCLOS III was negotiated the international community

effectively agreed that Canada had this preliminary claim to authority over Arctic waters.¹⁸ Building on the 1970s legislation, the Conservative government declared in 1986 a baseline around the entire Archipelago from which to measure Canadian territorial waters.¹⁹

Canada's latitude in pressing Arctic claims is severely limited by the small presence that it maintains in the region. There have been attempts to compensate for this but they cannot address the vast area involved or its remoteness. A recent military training exercise known as NARWHAL (August, 2004), was aimed at showing the flag in the far north.²⁰ Weather and technical difficulties plagued the operation from start to finish, illustrating how difficult it would be for the Canadian Forces to establish control of (let alone a sizable presence in) the Arctic.

As the incident referred to earlier between Trudeau and US Secretary of State Rogers reveals, claims, which are perceived to be sweeping, aggravate a stable, if unresolved, situation. The major naval and shipping states are also extremely suspicious, to the point of open hostility, of any sudden large extension of national jurisdiction over formerly High Seas. This has lead many to decline to sign, much less ratify, the latest (third) Law of the Sea covenant of 1982.²¹ This was the cause of the British reaction to extended Icelandic fishing claims in 1974, and almost scuttled UNCLOS III because of the claim by the USSR to what amounted to its sector of the Arctic. (The Soviet position was a none-too-well veiled attempt to provide a legal justification to move naval forces ominously closer to North America.)²²

Again, it is obvious that the assertion of sovereignty over vast swaths of the Arctic has a deleterious effect on the diplomatic approach - yet another mark against such a course of action. This is especially true when one considers that many states are aware of and concerned about the 'creeping jurisdiction' of Canada in the far north but have no effective way to counter it without provoking an international incident.²³ The

extreme remoteness of Hans Island is a double-edged sword: it is difficult for Canada to defend its claim, but even more difficult for Denmark to compel such a defence.

A related problem to the assertive approach is the fact that Denmark is an ally. It is difficult to believe that Canadian warships would sink a vessel sailing under the flag of a fellow NATO member,²⁴ though it is not completely beyond the realm of possibility if vital national interests are involved. One need only recall the strong action taken by Ottawa against European fishing trawlers in 1995. Unfortunately, the ships most likely to be used to challenge a Canadian presence are also warships. Canada's 'defence' of the Arctic would be best if it were heavily symbolic and a deterrent. This makes the Canadian Rangers an ideal force: they establish a permanent federal presence in the region, maintain the intensive use of the sea, land and ice, and cannot be lured into a confrontation in which Canada must either use force to defend its claims or relinquish them. This strengthens Canada's argument from historic use in any future case before the ICJ.²⁵

One should also consider the negative ramifications of Canada claiming its sector. The shape of Canada's far north means that the sectors of Greenland and Alaska block access from the sea to the Arctic Archipelago. Canada could find itself cut off from access to the far north if other parties were to stake as ambitious a claim as Canada is wont to. Because Canadian interests in the Arctic do not conflict directly with those of its neighbours it can reach an accommodation with them that does nothing to compromise its legal position. This was precisely the intent with the Arctic Waters Co-operation Agreement.

Oran Young, an American scholar, has argued that a similar but more extensive agreement should be negotiated that includes Greenland. He feels that the

question of legal status cannot be resolved, but that it need not block the establishment of competent administrative bodies to protect and exploit Arctic resources.²⁶

Conclusion

Although it would be tempting to embark upon a program of grandiose expansion to assert Canadian sovereignty in the Arctic, the reaction of the international community would undoubtedly reverse the gains that Canada has made thusfar. The trappings of sovereignty would be fleeting in an area where Canada has so little physical presence. However, the 'substance' of sovereignty, leading to the *de jure* establishment of it, can be realized for the entire Canadian sector. This can be done by extending functional jurisdiction, and by aggressively asserting the 200-mile Exclusive Economic Zone in the Arctic Ocean. This would push foreign commercial development well out onto the permanent pack ice, which for extraction purposes might as well be Jupiter. This 'imperialism by stealth' will at best be a long-term strategy, and the process must be embraced as readily as the goal or it will fail to circumvent the free ocean designs of the major shipping and naval states, or the territorial claims of Canada's Arctic neighbours.

Canada's ideal foreign policy on Hans Island is to wait the Danes out by refusing to negotiate a specific settlement, and by relying on a *status quo* that favours Canada while simultaneously increasing its physical presence on Hans Island. The obstinate refusal to cede even one inch of Hans Island, when coupled with dramatic gestures (such as ministerial visits) will frustrate Denmark's claims legal and politically.

Notes:

¹Pierre Trudeau and Ivan Head, *The Canadian Way: Shaping Canada's Foreign Policy, 1968-84*, (Toronto: McClelland and Stewart, 1995), 50-51.

²D.M. McRae, "The Negotiation of Article 234," in *Politics of the Northwest Passage*, Franklyn Griffiths, ed. (Kingston: McGill-Queen's University Press, 1987), 109.

³Lars Toft Resmussen, "Greenlandic and Danish Attitudes to Canadian Arctic Shipping" in *Politics of the Northwest Passage*, Franklyn Griffiths, ed. (Kingston: McGill-Queen's University Press, 1987), 158.

⁴Ronald St. John Macdonald Symposium, 13.

⁵"Summary: Fisheries Case (UK vs. Norway)" http://www.u-paris2.fr/cij/icjwww/iceses/tukn/tukn_isummaries/tukn_isummaries_19511218.htm, (accessed 20 Nov. 2004).

⁶Dunkley, 11-2.

⁷P. Whitney Lackenbauer, Ph.D. "The Real Cold War: Guarding Canada's North," public lecture, 25 November 2004.

⁸International Court of Justice, "Summary: Corfu Channel Case," <http://www.uparis2.fr/cij/icjwww/decisions/isummaries/lccsummary490409.htm>, Issued 9 April 1949 (accessed 14 Oct. 2004).

⁹"Summary: Fisheries Jurisdiction (DRD v. Iceland)," http://www.icj-cij.org/icjwww/iceses/ibi/ibi_isummaries/ibi_isummary_19740725.htm, (accessed 21 Nov. 2004) and "Summary: Fisheries Jurisdiction (UK v. Iceland)," http://www.u-paris2.fr/cij/icjwww/iceses/iai/iai_isummaries/iai_isummary_19740725.htm, (accessed 21 Nov. 2004).

¹⁰Christopher Kirkey, "Smoothing Troubled Waters: the 1988 Canada-US Arctic Co-operation Agreement," *International Journal* V. 50 (Spring 1995), 416-17.

¹¹Oran R. Young, "Arctic Shipping: An American Perspective," in *Politics of the Northwest Passage*, Franklyn Griffiths, ed. (Kingston: McGill-Queen's University Press, 1987), 133.

¹²Kirkey, 415-417.

¹³Young, 124-125.

¹⁴Joe Clark, "Statement to the House of Commons" (Ronald St. John McDonald Symposium Appendix I) and "The Real Cold War".

¹⁵*Canadian Way*, 55.

¹⁶Territorial Sea and Fishing Zone Act (1970), Canada Gas and Oil Act (1974), and the Arctic Waters Pollution Prevention Act (1970).

¹⁷Dunkley, 9-10.

¹⁸McRae, 109-110.

¹⁹Ronald St. John Macdonald Symposium, VIII.

²⁰CBC News On-line, "Military Exercise to Reaffirm Arctic Claims," http://www.cbc.ca/story/canada/national/2004/08/18/military_narwhal040818.html Posted Aug. 18th 2004 (accessed: 24 Nov. 2004).

²¹Dunkley, 3.

²²McRae, 111 and "The Real Cold War".

²³McRae, 108 and Ronald St. Macdonald Symposium, 10.

²⁴"Real Cold War".

²⁵"Real Cold War".

²⁶Young, 132-133.

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